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SEP 28 19
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 359

GREDE FOUNDRIES, INC., Iron Mountain Division,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

TO the Justices of the Supreme Court of the United States:

Grede Foundries, Inc., a corporation, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on May 2, 1951, enforcing an order of the National Labor Relations Board, dated April 27, 1949.

Opinions Below

The opinion of the Court below (A.R. 127)[1] is reported in 189 F. (2d) 258. The decision and order of the National Labor Relations Board appear at Pp. 38 through 41; and the findings, conclusions, and recommendations of the Trial Examiner, which were adopted by the Board, appear at Pp. 21 through 31 of the record printed for the Court below.

Jurisdiction

The judgment of the Court of Appeals was entered on May 2, 1951. The Honorable Harold H. Burton, on June 29, 1951, upon a petition, ordered that the time for filing petition for Writ of Certiorari be extended to and including September 29, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

(1) Whether the Regional Director of the National Labor Relations Board abused the discretion accorded him under the then-existing Rules and Regulations of the National Labor Relations Act and denied Petitioner an appropriate hearing by ordering a pre-hearing election where issues concerning the appropriate unit, the eligibility date, the name of the union to appear on the ballot, and the existence of a question concerning representation were raised during the preliminary investigation.

(2) Whether the Board's certification of representatives, issued on May 20, 1948, its decision and order

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[1] "A.R." refers to the printed additions to the record covering the proceedings in the Court below. "R" refers to the record printed for the use of the Court below.

issued on April 27, 1949, and the enforcement decree of the Court of Appeals are valid where the officers of the parent labor organization with which the affected union was affiliated did not sign their non-Communist affidavits until December 22, 1949.

(3) Whether the Board's determination of the appropriate unit and its certification of representatives, both issued after the effective date of the Labor-Management Relations Act, were valid where such determinations were based on a hearing conducted after the election, in disregard of Petitioner's request for a pre-election hearing, where Section 9(c)(1) of the Act specifically prohibits such a procedure.

(4) Whether the Board acted arbitrarily and capriciously in counting the ballot of an employee who had terminated his employment eight (8) months before the tally was made, and where the certification was based on a one-vote majority obtained in an election held eleven months prior to the date of certification.

Statutes Involved

The pertinent statutory provisions and rules and regulations, as issued by the National Labor Relations Board, are printed in Appendix A, infra Pp. 101-103.

Statement of the Case

This case involves the validity of a decree issued by the Court below, which enforced an order of the National Labor Relations Board, directing Petitioner to recognize and bargain with the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, UAW-CIO, as the exclusive

representative of certain of Petitioner's employees at its Iron Mountain Division plant.

Grede Foundries, Inc., your Petitioner, hereinafter referred to as the "Company," is a Wisconsin corporation, with its principal office and place of business in Milwaukee, Wisconsin. It operates a plant for the manufacture and sale of gray iron castings at Kingsford, Michigan (R. 23). During the period pertinent to these proceedings, the Company at this plant employed approximately seventy-seven (77) employees in the categories affected (R. 62).

On May 9, 1947, the United Automobile Workers CIO Competitive Shop Department, filed a petition with the Regional Office of the National Labor Relations Board, requesting that it be certified as the bargaining agent for "all production employees except for supervisory and clerical personnel" (R. 61, 98-99). In a letter dated May 26, Nielsen, a Field Examiner attached to the Board's Regional Office, forwarded to the Company certain consent election agreement forms and suggested that the Company get in touch with the Union representatives to agree, among other things, on the appropriate unit and the payroll date of eligibility (R. 176). In the telephone conversations and correspondence which followed, it became apparent that there were disputes concerning the appropriate unit, the eligibility date which would determine the voting register to be used in the election, the name of the union that would represent the employees, and the very existence of a question affecting representation (R. 142-143). The parties confirmed their different views in letters to the Regional Office dated May 29 and June 5, 1951. (R. 177-178, 178-179).

On June 5, Nielsen, the Field Examiner, wrote to Sabol, another Union representative, indicating clearly

that the Regional Office was considering a pre-hearing election, and stated that just as soon as certain information requested of the Company was received, "we will be able to decide what to do next and will let you know right away" (R. 163-164). Grede, the Company's president, in a letter dated June 11, 1947, submitted the requested information, restated its position with respect to the appropriate unit, and requested that a "formal hearing be held at which all questions involved can be argued" (R. 180-182).

Thereafter, in a letter dated June 17, 1947 (R. 165), the Regional Director, without making any attempt to reconcile the issues raised (R. 146-147), advised the Company that he would conduct an election on June 24, 1947. Grede, in a letter dated June 21, 1947 (R. 183), informed the Regional Director that he was surprised that the Board had not proceeded with a pre-election hearing, as requested, that the Company had not consented to the election, but that the Company nevertheless had posted the notices and was enclosing a payroll list as requested. The union which appeared on the ballot was the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-CIO (R. 167), hereinafter referred to as the "International Union." The election notice forwarded by the Board, and posted by the Company, advised the employees that, "All production and maintenance employees of the Company at its Iron Mountain Division, exclusive of office and clerical employees, watchmen, and supervisory employees" (R. 167), were eligible to vote. At a pre-election conference, Nielsen, the Board's agent, on his own initiative, eliminated the names of two watchmen from the list of employees supplied by the Company (R. 162) at the election. Thirty-five (35) votes were cast for the Union,

thirty-three (33) against, and four (4) ballots were challenged (R. 63).

At the formal hearing, held on July 9, 1947, both the Company and the Union agreed that the watchmen should be included in the bargaining unit (R. 105); and as a result, no testimony was introduced as to the duties of the watchmen. The Company moved to set aside the election (R. 73).

Sabol, a Union official, testified that the International Union would establish a local union which would bargain for the employees (R. 108), and that the Competitive Shop Department, the original petitioning union, acted as the bargaining agent and is a labor organization (R. 108). Lee St. Arnauld, an employee Pattern Clerk, whose ballot had been challenged at the election, appeared as a witness for the Union (R. 113).

Under date of August 1, 1947, the Company forwarded a brief to the Board in support of its motion to set aside the election (R. 84-94).

In response to a telegraphic request on March 8, 1948, the Company informed the Board, among other things, that it still employed two watchmen, and that the Pattern Clerk job had been eliminated (R. 71).

In a motion dated March 17, 1948, the Company moved to dismiss the petition on the ground that "I. The lapse of time since the election is a bar to certification" and "II. The Board is without authority to certify the results of the election because of the Board's failure to comply with the procedural requirements of Section (9)(c)(1) of the Labor-Management Relations Act" (R. 64-70). Nevertheless, the Board, in a decision and direction dated April 8, 1948 (R. 72-81), determined the appropriate unit and

directed that three (3) of the challenged ballots, including that of St. Arnauld, the former Pattern Clerk, be counted. The Company, on April 12, 1948, informed the Regional Director that St. Arnauld had voluntarily terminated his employment with the Company on August 8, 1947 (R. 49).

Upon receipt of the Supplemental Tally of Ballots on April 22, showing thirty-six (36) votes for the Union and thirty-five (35) against (R. 95), the Company, on April 24, filed objections thereto on the ground, among other things, that the Board had improperly counted the ballot of Lee St. Arnauld (R. 82-84). The Board, on May 20, 1948, certified that the International Union had been designated and selected by a majority of the employees in the unit found appropriate in the Board's April 8 decision (R. 96).

Thereafter, the Union demanded of the Company that negotiations take place (R. 58), and the Company replied, declining to bargain, on the grounds that the certification was invalid and, "We do not believe that this union represents a majority of our employees" (R. 59).

The Union thereafter filed a charge with the Board, alleging that the Company had refused to bargain on June 9, 1948 (R. 14-15), pursuant to which a complaint was filed on December 7, 1948 (R. 16-18). The Company responded to the complaint, alleging that the certification was invalid and denying that the Union, on May 20, 1948, or thereafter, was the majority representative of the Company's employees (R. 19-20). The usual hearing was held on December 20, 1948; and on April 27, 1949, the Board rendered its decision and order based on the May 20, 1948 certification, directing the Company to recognize and bargain collectively with the International

Union as the exclusive representative of the employees (R. 38-41). The Company refused to comply with the order.

On July 31, 1950, the Board petitioned the United States Court of Appeals for the Sixth Circuit for a decree enforcing the order of the Board (R. 1-5). All the questions presented herein, except that relating to the validity of the Board's order and the Court's decree because of the failure of the officers of the National Union to file their non-Communist affidavits, were argued before the Court below. The Court of Appeals, on May 2, 1951, in a summary opinion, decreed enforcement of the Board's order (A.R. 187). On May 14, 1951, this Court, in *NLRB v. Highland Park Mfg. Co.*, 341 US 322, determined that the Board was without authority to issue a complaint or order based on a charge filed by a union whose parent affiliate was, at the time, not in compliance with the non-Communist affidavit requirements of the Act.

Under date of June 20, 1951, the Company moved the Court of Appeals to vacate its judgment of May 2, 1951, on the ground that the Board was without authority to issue its complaint and order, because of the fact that the National officers of the CIO had not filed their non-Communist affidavits until December 22, 1949 (A.R. 192 to 195). The Board filed a statement in opposition to the motion (A. R. 206 to 211), to which the Company filed a reply (A.R. 211 to 218). The Court of Appeals has not, as of the date of this petition, passed on Petitioner's motion to vacate the judgment of May 2, 1951. We will advise this Court of the disposition made of this motion by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Petitioner's Request for a Pre-Election Hearing

(1) The evidence shows that, during the preliminary investigation of the Union's petition for certification, the Company and the Union disagreed as to the appropriate bargaining unit and payroll to be used as a voting register in the election. There was also a question as to what labor organization would actually act as the bargaining agent and as to whether or not the Union had sufficient membership to raise a question affecting representation. The Company, under the circumstances, requested that a hearing be held to determine these issues before an election was conducted. Section 9(c) of the Wagner Act, infra Pp. 102, required an appropriate hearing, and the Board's Rules and Regulations, infra Pp. 103, required that the Regional Director recommend a formal hearing where there were substantial issues. The Regional Director, without making any attempt to resolve the pending issues, proceeded to order and conduct an election. The Company contended before the Board and the Court below that these were matters which had to be determined *before* an election could be conducted and that the Regional Director had exceeded the discretion accorded him under the then-existing Rules and Regulations of the Board and had denied the Company an appropriate hearing by ordering a pre-hearing election. It was pointed out that the result of the election could have been affected by the votes of the two watchmen who were eliminated by the Regional Director.

The decision of the Court below is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *NLRB v. S. W. Evan & Son,* 181 W. (2d) 427. The Court, in that case, held that a dispute concerning the eligibility date and the appropriate unit in-

volved substantial issues which required resolution by the Board prior to the hearing, and refused to enforce the Board's order to bargain on the ground that the employer, under the circumstances, was entitled to a pre-election hearing. The lower court's decision also appears to be in conflict with the opinion of this Court in *Pittsburgh Plate Glass Co. v. NLRB,* 313 US 146 that:

> "The Labor Act places upon the Board the responsibility of determining the appropriate group of employees for the bargaining unit." (P. 152) and that the " * * * Certification of the bargaining representative follows the determination of the appropriate unit." (P. 156)

The decision below also appears to be in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Marshall Field & Co. v. NLRB,* 135 F. (2d) 391, which held that:

> "The Board should have decided upon the unit or units appropriate for collective bargaining, before it called an election." (P. 393), citing the *Pittsburgh Plate Glass Co., supra.*

The Regional Director not only placed a union other than the petitioning union on the ballot, but disregarded the information he received concerning the establishment of a *local union* to represent the employees (R. 179).

The lower court's decision upholding the Regional Director's right to determine the name of the union which shall appear on the ballot appears in conflict with the decision of this Court in *May Dept. Stores v. NLRB,* 326 US 376, wherein it was held that:

> "The Board directs what names go on the ballot." (P. 381)

It would seem clear that the Board cannot determine the name of the union which shall appear on the ballot *after* the election has been held.

The Failure of the CIO to Qualify for the Use of the Board's Facilities

(2) Should the Court below deny Petitioner's motion to vacate the judgment of May 2, 1951, enforcing the order of the Board, it appears that such a denial would be in direct conflict with the decision of this Court in *NLRB v. Highland Park Mfg. Co.,* 341 US 322. It is clear that the complaint and order of the Board were issued prior to the time the officers of the Congress of Industrial Organizations, with which the Union was affiliated, executed their non-Communist affidavits, as required by Section 9(h) of the Act. See infra P. 101. Thus, the Board was without jurisdiction to institute these proceedings. Its order was invalid, leaving nothing for the Court below to enforce. This Court, in deciding the same issue presented in Petitioner's motion to vacate, stated:

> "The Board is a statutory agency and when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid." (*NLRB v. Highland Park Mfg. Co.,* 341 US 322, 71 S.Ct. 758, P. 761)

The Court of Appeals for the Fifth Circuit, in *Cathey Lumber Co. v. NLRB,* 189 F. (2d) 428, on rehearing, set aside its enforcement order on authority of this Court's decision in the *Highland Park* case, *supra.*

The Certification was Based on a Post-Election Hearing

(3) The Board's determination of the appropriate unit and the supplemental decision and certification were both

issued subsequent to the effective date of the Taft-Hartley Act. This action was in direct conflict of the provisions of Section 9(c)(1) of the amended Act (See P. 101), which specifically prohibits the post-election hearing procedure. Since the determination of the appropriate unit and the certification of representatives took place subsequent to the effective date of the Act, the Board's action does not come within the specific exceptions provided in Section 103 of the Labor-Management Relations Act (See infra P. 102). Counsel for the Petitioner has been unable to find, and the Board in the brief submitted to the Court below did not cite, any court decision which sustains the Board's right to issue a certification after the effective date of the amendments where such a certification is based on a pre-hearing election. This Court has held that:

> "The conclusive act of decision, in the investigation, is the certification. Until it is taken, what precedes is preliminary and tentative." (*Inland Empire District Council v. Millis,* 325 US 697, P. 707)

In the instant case, the conclusive act of the Board took place under the authority of the amended Act.

No Evidence of Union Majority on Date of Certification

(4) The Board, in its determination issued on April 8, 1948, directed that the challenged ballot of an employee who had terminated his employment eight (8) months before be counted under circumstances where it was likely that that ballot would be decisive in the election. The ballot was cast by an employee who appeared as a witness for the Union at the July 9 hearing. The final vote, including the questioned ballot, was thirty-six (36) for the Union and thirty-five (35) against (in an election held more than four years ago). In addition, the

Company had asserted in a motion to dismiss, filed with the Board on March 17, 1948, that there had been a turnover among the employees of approximately twenty-five per cent (25%), that the employer's management organization had been changed, that evidence of union activity among the employees was lacking, that there had been a substantial change among International and local Union officials, and that "a certification at this date would not represent the desires of the employees." The Board, nevertheless, eleven (11) months after the election, wherein the Union secured a dubious one-vote majority, certified that, as of May 20, 1948, the Union still represented a majority of the employees. It is submitted that a certification under these circumstances, approved by the court below, is in conflict with the statement by this Court that the Board, in certifying representatives,

> "* * * must act so as to give effect to the principle of majority rule set forth in Section 9(a), a rule that is sanctioned by our governmental practice, by business procedure, and by the whole philosophy of democratic institutions." (*NLRB v. Tower Co.*, 329 US 324, P. 331)

This is not a case where the employer asserts a loss of majority *following* the certification.

Importance of Issues

(5) It is respectfully submitted that the questions presented are of major importance to the administration of the National Labor Relations Act, the effectuation of the policies of Congress, and the protection of the right of employees freely to choose their bargaining representatives, as set forth in the said Act. The administration of our labor laws in a manner consistent with the express will of Congress is a matter of wide public interest and

will contribute to a lessening of litigation and to a greater acceptance on the part of employers and unions of the laws as written by the Congress. Further, the decision below is in direct conflict with the decisions of other courts of appeal, as well as of this Court.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

September 26, 1951.

Respectfully submitted,

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APPENDIX A

1. The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 141 et seq.), are as follows:

Sec. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 9(c)(4). Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

Sec. 9(h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist party or affiliated with such party, and that he does not believe in, and is not

a member of or supports any organization that believes in, or teaches the overthrow of the United States Government, by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

2. The pertinent provision of the Labor-Management Relations Act of June 23, 1947, Ch. 120, 61 Stat. 136, is as follows:

Title I, Sec. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under Section 9 of the National Labor Relations Act prior to the effective date of this title until one year after date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

3. The pertinent provision of the National Labor Relations Act before amendment (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C., Secs. 151 et seq.), is as follows:

Sec. 9(c). Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

4. Rules and Regulations of the National Labor Relations Board, Series 4, in effect in June 1947:

Sec. 202.18. Formal hearing—If no informal adjustment of the question concerning representation has been effected, the Regional Director will recommend the formal procedures be taken. These may take the form of either (a) an immediate election followed by a hearing, if the case presents no issues of such substance to require final decision by the Board before a proper election may be held, or (b) a hearing followed by Board determination of the issues and, if appropriate, an election. * * *

Sec. 202.20. Procedure respecting elections conducted after hearing.—(a) If the preliminary investigation indicates that there are substantial issues which require Board determination before an appropriate election may be held, the Regional Director refers to the case of the Regional Attorney with the recommendation that a hearing on the issues be held.